

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

74-2207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x -----

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DAVID FLORES,

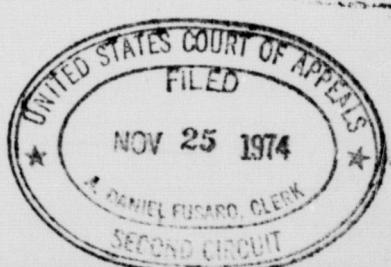
Defendant-Appellant.

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BRIEF FOR DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Appellant
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349-4646



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PRELIMINARY STATEMENT

David Flores appeals from a judgment convicting him, after a trial by jury, of violating and conspiring to violate 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(B). The conspiracy count of the indictment that charged David Flores with conspiring to possess and distribute Schedule I and II controlled substances. The substantive count charged Flores with sale of a Schedule III controlled substance. The trial was before Hon. Milton J. Pollack. Flores, currently on bail, was sentenced to the maximum term pursuant to 18 U.S.C. §4208(b) pending the results of a study conducted pursuant to 18 U.S.C. §4208(c).

ISSUES PRESENTED

This case tests the limits of the ever-broadening use of conspiracy theories. Through two specific issues, it raises serious questions about the appropriate doctrinal limits of conspiracy law and the prosecutor's power to invoke it. The two specific issues are whether David Flores was improperly joined with other defendants in violation of Rule 8 Fed. R. Cr. P. and whether the government proved one overall conspiracy, as charged.

STATEMENT OF THE CASE

This appeal is from a retrial. At the earlier trial, the jury failed to agree on a verdict except to acquit one of the five defendants on one count and to convict another of the five defendants on another count. In the second trial, the jury convicted all five defendants of all remaining counts.

At the commencement of the second trial, Flores moved for a severance on the ground that there was no evidence at the first trial supporting the conspiracy charge of the indictment. Without the conspiracy charge, joinder was improper. The Court declined "to predict that the evidence on this trial

will be merely coextensive with the evidence of the last trial." It also stated that there seemed to be "enough in the record of the last trial to warrant a reasonable belief that the Government may be able to adduce [sufficient] evidence at this trial of the conspiracy count." Accordingly, the motion was denied (2-3).*

Flores had made a similar motion at the first trial on the ground that the prosecutor's file, which had been made available to all defendants, itself indicated no single conspiracy. In response, the prosecutor submitted a memorandum in opposition to the claim that only multiple conspiracies were charged. In the memorandum, the prosecutor provided a chart of the "single" conspiracy he intended to prove. The page containing that chart is appended to this brief.

The Trial Testimony

MICHAEL STARBUCK, whose testimony was taken subject to connection, said that on November 3, 1973, he met William Brandt to discuss the purchase of marijuana and LSD (35). Starbuck knew Brandt because one and a half to two years earlier he conspired with Brandt to import cocaine into the

*References are to the trial transcript.

United States. Starbuck had financed this importation with \$5,000 of his own money. When he testified, Starbuck was under indictment for this cocaine importation conspiracy and was scheduled to enter a guilty plea (36-7).

On November 12, Starbuck and Brandt went to Woodstock, New York in an unsuccessful attempt to buy LSD (39).

On November 23, Starbuck met with Brandt and possibly David Miley to negotiate an LSD purchase (39-40). Starbuck received a sample of the drug (41).

On November 27, Starbuck, Brandt, John Godinsky and Miley met with Agent Robert Nieves in Brandt's room at a Greenwich Village hotel (42). Godinsky gave Nieves LSD and Nieves gave Brandt \$650. Brandt gave some of the money to Godinsky. Nieves and Brandt discussed a purchase of liquid LSD (43).

On December 5, Starbuck met with Brandt and Jan Lang at Lang's apartment to negotiate the purchase of an ounce of a drug called THC for \$1,800 (44). Lang gave Starbuck a sample of the THC (45).

On December 13, Starbuck and Brandt drove with Agents Nieves and Robert Palombo to the apartment of David Flores. While the agents waited in the car, Starbuck and Brandt went up to the apartment. Dean Vavarigos was there. Brandt told

Flores that the customers were downstairs, but that they would not front the money until they saw the product (46).

Vavarigos said to let one customer up. Starbuck went downstairs and returned with Nieves (47). Nieves weighed the THC and gave Brandt \$1,800. Brandt gave Flores a portion of the money and said, "twelve, right?" Nieves asked how to "cut" the THC. Flores and Vavarigos discussed this and Vavarigos instructed Nieves to use lactose (48).

On December 17, Starbuck met Brandt at his hotel (49). Brandt sent Miley to take Starbuck to Vavarigos. They met Vavarigos in Queens and discussed the purchase of cocaine. Vavarigos gave Starbuck a sample (50).

On January 4, 1974, Starbuck again met Brandt at Brandt's hotel. The two of them went to see Lang about purchasing LSD (51).

On January 15, Starbuck and Brandt met with Lang, Nieves and Palombo (54). While Starbuck and Brandt waited at Brandt's store, Palombo and Nieves went with Lang to a contact who was supposed to provide LSD. After the purchase, Nieves and Palombo returned to Brandt's store and paid him \$200 (55).

ROBERT NIEVES testified that on November 27, 1973, Starbuck came to Nieves' office and told Nieves and Palombo that he had arranged to buy LSD from Brandt (181-2).

Subsequently, Nieves and Starbuck met with Brandt, Miley and Godinsky at Brandt's hotel room (184-5). Brandt indicated that Godinsky was the source of the LSD (186). Nieves was told to pay Brandt. He gave him \$650 and Brandt gave \$180 to \$200 of it to Godinsky. Nieves asked about larger quantities. Brandt said to discuss that with him after Godinsky left (187). They did (188). Brandt also mentioned the availability of THC at \$1,800 an ounce (188).

On December 13, Nieves, Palombo and Starbuck picked Brandt up at his hotel and drove to Flores' apartment (192-3). Brandt and Starbuck went upstairs first. Subsequently, Starbuck came down for Nieves, who left the \$1,800 with Palombo in the car. Starbuck and Nieves returned to Flores' apartment (194).

Brandt introduced Nieves to Flores and Vavarigos and then indicated the drugs on a balance. Nieves weighed the drugs on his own scale, went downstairs for the \$1,800 and returned. He gave the money to Brandt (195-7).

After discussion between Vavarigos and Flores, Nieves was advised to cut the drug with lactose and to sell it in capsules (198). Nieves noticed Brandt give Flores money and heard him say, "twelve, right." Flores indicated his agreement. Nieves and Starbuck left the apartment (199).

Although Nieves was told he was buying THC, a Schedule I drug, the drug he did buy actually turned out to be PCP, a Schedule III drug (200).

On December 18, Nieves and Palombo had a telephone conversation with Vavarigos, which was taped and played into evidence (201, 204).

On January 3, 1974, Nieves called Brandt about purchasing LSD. Brandt said he had about 3,850 dots available. Nieves and Palombo then went to Brandt's hotel and met Brandt, Godinsky and Miley (204). Godinsky produced 1,350 dots. Brandt said he would have the balance in an hour. Nieves and Palombo paid for the first portion, left, and returned about an hour later. Only Miley was there at the time (205). Eventually, Brandt and Godinsky returned and the entire transaction was completed (206).

On January 8, 1974, Palombo and Nieves went to Vavarigos' apartment to purchase a pound of cocaine for \$16,000 (207), but after riding around for awhile, the deal fell through (209-10).

On January 10, the agents again went to Vavarigos' apartment for the same purpose, but the deal was not consummated. However, Vavarigos gave the agents a small quantity of THC and said it was better than the THC they had purchased on December 13 (211).

On January 15, Starbuck brought Nieves a sample of LSD called "purple haze." Starbuck said he had arranged to buy 4,000 tablets of this LSD from Brandt later that day (213-14). Subsequently, Starbuck and the agents met Brandt at his store. Lang was there. The agents went with Lang to meet his connection and arranged to pay Brandt his \$200 commission at the store later (215).

The agents accompanied Lang to an apartment on East 9th Street and were introduced to a person whom Lang called Joe and who was subsequently identified as Joseph Wenzler (216). After discussion, it was agreed that the deal would be done 2,000 tablets at a time. Joe left the apartment and returned with the first delivery. Palombo gave him \$600. Then Joe left again and returned with another 2,000 tablets, for which he was paid. The agents then left (217).

Back at the storefront, the agents gave Brandt \$200 (219).

On February 6, the agents met Brandt and agreed to purchase 50,000 dots of LSD for \$16,500. Brandt advised the agents that his connection, Strider, did not want to meet anyone until the day of the deal (220). The agents told Brandt they needed 24 hours to raise the money (221).

On February 12, the agents met Miley and Brandt at the store (221). Strider didn't show up, so Miley went to find

him. Strider was identified as Robin Bachia (226). When Miley returned with Strider, the agents purchased an initial 1,800 dots of LSD (227). Before Strider would go along with the larger deal, he wanted to see the money. He accompanied the agents to the car to see the money. The three of them then drove to the location of Strider's connection (228).

Strider got out of the car and returned ten minutes later with another 10,000 dots of LSD. He said that was all he could produce at the time. The agents then arrested Strider (229).

Strider agreed to cooperate and led the agents to the apartment of Marvin Goldstein. Goldstein was arrested and his apartment searched. The search turned up 4,000 dots of LSD and \$660 in government money (230). Subsequently, Brandt, Wenzler and Miley were arrested (236-7).

In a series of questions on cross-examination, Nieves said that he had no evidence that any of the defendants who were not charged with particular substantive sales either knew about or agreed to or gained from those sales (351-4).

ROBERT PALOMBO testified to substantially the same facts as Nieves (356 et seq.). On cross-examination, Palombo also said that he had no evidence that any of the defendants

not charged with particular substantive sales knew about or agreed to or gained from those sales (497-500).

Flores moved to dismiss the charges against him. On the conspiracy charge, he claimed that no fair preponderance of nonhearsay evidence indicated a single conspiracy among all of those charged in the Indictment. After discussion, the Court denied the motions, ruling that there was a fair preponderance of nonhearsay evidence and that there was sufficient evidence from which the jury could find a single conspiracy beyond a reasonable doubt (567, 576-9).

Despite a lengthy charge, the jury twice asked for repeated instructions on the definition of conspiracy (756, 760). It also requested testimony on "David Flores on or about December 13th involvement" (756).

In his summation, the prosecutor played a tape, of a conversation Nieves and Vavarigos (676). Before playing the tape, he raised Flores' contention that there was not a single conspiracy. He then played a small portion of the tape and immediately repeated to the jury a segment of it. The entire presentation, as it appears in the record, follows:

There are no conspirators here, nobody knows anybody. Let us hear Mr. Vavarigos speak again, because it is pertinent to Mr. Gillers' client, keeping in mind the same conversation with respect to the THC.

(Tape played to the Jury.)

"This is going through so many people. You, Bobby, Mike, Billy. You know. David and then to me, right."

ARGUMENT

I

THERE WAS NO FAIR PREPONDERANCE OF NONHEARSAY EVIDENCE
OR EVIDENCE PROVING BEYOND A REASONABLE DOUBT
THAT A SINGLE CONSPIRACY EXISTED.

The Law

The law in this Circuit is a study of the Court's response to Kotteakos v. United States, 328 U.S. 750 (1946) and Blumenthal v. United States, 332 U.S. 539 (1947). For the most part, this Court has chosen to distinguish Kotteakos and Blumenthal, first by continued reliance on analogies to chain conspiracies and wheel conspiracies, but recently even this distinction has lost its vitality, at least in drug cases. The Second Circuit has had to face these issues perhaps more than any other Circuit, though the Ninth runs a close second, because major drug importation conspiracies and substantive offenses most frequently occur in the Southern and Eastern Districts of New York.

This brief suggests that the doctrines which the Court has understandingly evolved to meet these problems are

on the verge of becoming intellectually unsupportable. This appeal, it is submitted, tests the limits of Second Circuit conspiracy holdings.

The evidence law in this area is, and has for a long time been, that there exist two tests. Whether the words spoken by A may be used against B "is for the judge alone . . . if he admits it the jury may use it like other evidence."

United States v. Nardone, 127 F. 2d 521, 523 (2d Cir. 1942).

In other words, the trial judge makes an independent determination whether the nonhearsay evidence is sufficient to show agency. If so, the jury gets it all - hearsay and nonhearsay - to use as it likes. United States v. Ross, 321 F. 2d 61 (2d Cir. 1963). United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969).

What test does the trial judge use in determining whether to allow A's statements to be used against B? "A fair preponderance of the evidence independent of the hearsay evidence," said the Ganey Court, 417 F. 2d at 1120. Accord, United States v. Calabro, 449 F. 2d 885, 890-91 (2d Cir. 1971).

But there is also a second test. Even though a fair preponderance of the nonhearsay evidence may permit the use of an agency exception to the rule against hearsay, more is needed to send the conspiracy charge to the jury. There must be evidence - hearsay and nonhearsay - from which the conspiracy can

be found beyond a reasonable doubt. United States v. Borelli, 336 F. 2d 376, 387 (2d Cir. 1964). United States v. Cantone, 426 F. 2d 902 (2d Cir. 1970).

So much for the rules of evidence. Now how have Kotteakos and Blumenthal fared here? In United States v. Aqueci, 310 F. 2d 817, 826-27 (2d Cir. 1962), the Court carefully pointed out that "the Government's evidence successfully assimilates the conspiracy before us to the model of the so-called 'chain' conspiracy, so familiar in other narcotic cases." The Court continued:

The "chain" conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser. . . . That form of conspiracy is dictated by a division of labor at the various functional levels - exportation of the drug from Europe and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user.

The Court then analyzed the structure in Aqueci using a conventional distribution model - exporters, importers, brokers and salesmen. In response to a claim by two appellants that they were independent of the central conspiracy, the Court said that

it was enough to make [them] members of the overall conspiracy that the success of their "independent" venture was wholly dependent upon the success of the entire "chain." . . . An individual associating himself with a "chain" conspiracy knows that it has a scope and that for its success it requires an

organization wider than may be disclosed by his personal participation.

The Court continued the "wheel and chain" analysis in subsequent years. See, e.g., United States v. Borelli, supra. In United States v. Cirillo, 468 F. 2d 1233, 1238 (2d Cir. 1972), the Court said that appellant's principal argument on appeal is one not infrequently heard in complicated conspiracy cases. . . ." However, the Court concluded that:

It can hardly seriously be contended that the facts of this case make out a so-called 'spoke' conspiracy. . . . This case is the archetype of a 'chain' conspiracy . . . with links connecting the conspirators at the critical nexus points of exoporation, transportation and distribution of narcotics.

In United States v. Salazar, 485 F. 2d 1272 (2d Cir. 1973), the single conspiracy doctrine underwent a subtle expansion. Although the evidence proved a clear "chain," with all the divisions of labor this Court has relied on in the past, there was a twist. Some members of the chain chose to deal between themselves in order to exclude a third member, at least on certain sales. The third member, Salazar, argued that evidence relating to transactions from which he was excluded should not have been permitted in evidence on the ground that "these transactions were acts in furtherance of a second conspiracy, wholly independent from the single

conspiracy charged in the indictment." 485 F. 2d at 1276.

The Court was unimpressed. Even though the other conspirators had tried to cheat Salazar by excluding him from a portion of their operation - just about the most "unpartnership-like" thing you can do - Salazar still had "criminal liability for their activities in furtherance of the conspiracy." The Court was apparently impressed that the excluded transactions were nevertheless "within the scope of the agreement reached by all parties" earlier. The object was the same. The modus operandi was the same. So "the mere fact that they chose to bypass [Salazar] on certain transactions . . . hardly alters our conclusion that these activities were entirely consonant with and in furtherance of the original conspiracy in which the appellant was a participant." 485 F. 2d at 1276-77.

The lesson of Salazar is that if you help build an illegal business and profit from some of its operations, you're going to be responsible for all of its foreseeable operations even if they result from an effort to steal your share of the profits. This holding, while an extension of earlier cases, is nevertheless consistent with prior conspiracy notions.

As late as 1974, in United States v. Arroyo, 494 F. 2d 1316, 1319 (2d Cir. 1974), the Court continued to maintain

the "wheel and chain" analogy, explaining its necessity in terms of the bigness of large importation conspiracies and in the likelihood that participants in these at least know of the various positions, if not who fills them. Said the Court:

It would be unrealistic to assume that major producers, importers, wholesalers, or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy.

In United States v. Mallah, ____ F. 2d ____ (2d Cir. September 23, 1974), the Court continued to emphasize that "one who deals in large amounts of narcotics is held to the knowledge that there is a large criminal organization which is making that deal possible, and one is liable as a co-conspirator even though one has no personal knowledge of the identity of many of the co-conspirators." (Slip Op. at p. 5495.) Then, quoting Judge Mulligan's opinion in United States v. Bynum, 485 F. 2d 490, 495 (2d Cir. 1973), vacated and remanded on other grounds, ____ U.S. ____ (May 28, 1974), the Court explained that its analysis took into consideration "that the narcotics business generally takes the shape of a joint criminal venture among many criminals." (Slip Op. at 4595.)

The Mallah Court then went on to further blur the distinction between chain and wheel conspiracies, at least

for drug cases:

Neither has the classical distinction between simple chain and hub-spoke conspiracies held up well in the area of narcotics conspiracy, for where two or more chains are connected to a hub by core conspirators this Court has not hesitated to view the entirety as a single conspiracy. (Slip Op. at 4597).

Finally, the Court practically read Kotteakos out of the narcotic conspiracy area when it wrote (Id. at 5501):

Moreover, where the offense charged is conspiracy to violate federal law other than the narcotics laws, and thus where the offense is likely to be more akin to a "Mom and Pop" business than to a corporate enterprise . . . Kotteakos retains more vitality. . . .

Appellants arguing multiple conspiracies also often argue that, in any event, their participation in the alleged single conspiracy was but a "single act," and therefore insufficient to pull them in to the entire conspiracy.

Cases so holding are United States v. DeNoia, 451 F. 2d 979, 981 (2d Cir. 1971). United States v. Santore, 290 F. 2d 51, 78 (2d Cir. 1960). United States v. Aviles, 274 F. 2d 179, 190 (2d Cir. 1960). United States v. Stromberg, 268 F. 2d 256, 267 (2d Cir. 1959). United States v. Reina, 242 F. 2d 302, 306 (2d Cir. 1957). Recently, this "single act" doctrine was developed further in United States v. Torres ____ F. 2d ____ (October 8, 1974). There, the Court summarized some of the cited cases this way:

These cases all involve large, multiparty conspiracies. Their teaching is that absent proof of knowledge of the

broader conspiracy, a single act such as delivery of the drugs (DeNoia; Stromberg) or actual sale (Reina) or purchase (Aviles) is insufficient evidence from which to draw an inference that a defendant knew about or acquiesced in the larger conspiracy.

The Court then indicated that the essential questions in a "single act" defense are the nature of the "act" and the "proportion" of the entire scheme that the act forms. Said the Court:

Thus, to speak of a "single act" is misleading; rather, it is the qualitative nature of the act or acts constituting the single transaction . . . viewed in the context of the entire conspiracy which will determine whether an inference can be drawn as to the actor's knowledge of the scope of the conspiracy.

The Facts and the Law

Legal doctrines should draw lines that have some relation to the real world. Doctrines are valuable not only for what they include but also for what they exclude. Application of a single conspiracy theory to the facts of this case will leave nothing excluded. The rule becomes tantamount to a conclusive presumption that people who deal in drugs are conspiring with all their contact's contacts.

If the Court still talked in terms of chains and wheels, this is clearly a wheel. Even the prosecutor's diagram, contained in his trial memorandum and annexed to this brief, shows a wheel with three spokes. The evidence

interpreted most favorably to the Government, Glasser v.

United States, 315 U.S. 60, 80 (1942), shows this:

Starbuck, in trouble, agreed to cooperate (75). He went to the only contact he knew, Brandt, and told him that he had customers for any drugs Brandt could provide (144). Brandt was the middleman, who sought out suppliers and earned commissions (148).

This structure is a wheel and Brandt is the hub. Each of the transactions testified to at trial involved different people. Some, like Flores, only once. No sale was necessary for any other sale. This was not a distribution chain. Each of the sales could have been consummated regardless of the success of the others. Unlike many of the cases cited above, this was not even an operation to provide a constant source of one particular drug. Several different drugs were involved.

A doctrine is only useful if it has limits. Where might Flores' liability have stopped? Was Flores responsible for every subsequent sale without limit? If Brandt had continued to introduce Starbuck to different sources for different drugs for months or years, would Flores be liable for these? Application of a single conspiracy doctrine to this case permits that doctrine to run wild. Was the scope of the

conspiracy in which Flores was involved anyone and everyone whom Brandt could find to provide drugs for Starbuck? To ask the question is almost to answer it.

The cases say that a co-conspirator is responsible for all actions taken by his partners within the "scope" of the conspiracy. What was the scope of this single conspiracy? Appellant respectfully submits that it is logically absurd to say that the scope was anything Brandt chose to do with Starbuck.

Consider the "single act" cases. The evidence shows that Flores facilitated the transfer of a controlled substance from Vavarigos to Brandt to Nieves. The evidence shows that he received funds for this. Does this "single act" indicate an assent by him to make himself part of every past and future sale Brandt negotiates with others? Or does it show, viewed realistically, that Brandt called Flores up and asked if Flores could provide any drugs to a customer who would buy any drugs?

Torres said to consider the "proportion" of the "act" to the entire scheme. Here, Flores participated in perhaps one-tenth of the sales or aborted sales testified to at trial. It might have been one-fifth, if the agents had decided to make their arrest earlier, or it might have been one-fiftieth

if the agents had decided to wait six months. Flores had no control over the proportion of the entire scheme that his single act formed. He had no control because he had nothing to do with the rest of the scheme. The Government can point to no evidence in the record tending to prove Torres' involvement with the entire scheme, other than the December 13 sale.

Appellant respectfully contends that there is no evidence in the record, let alone a fair preponderance of the evidence, justifying a decision to allow the jury to consider the acts or statements of one defendant against another. Likewise, there is no evidence in the record from which it is possible to conclude beyond a reasonable doubt that there was a single conspiracy, as charged.

At trial, Flores contended that he was only involved with the other defendants in a general way. He requested and there was given an instruction under United States v. Purin, 486 F. 2d 1353, 1369 (2d Cir. 1973) that

a mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish an individual's own participation in the conspiracy.

The erroneous rulings on the conspiracy charge allowed the statements of others to be used against Flores,

undermining this Purin defense. In fact, in direct response to this defense the prosecutor on summation played and repeated Vavarigos' statement in the tape:

This is going through so many people. You, Bobby, Mike, Billy. You know. David and then to me. right.

Given Flores' presence at only one sale, given the jury's request to have the testimony regarding him reread and given their requests on two occasions for new conspiracy instructions, the errors on the conspiracy court seriously compromised Flores' right to a fair trial on the substantive count as well.

In conclusion, appellant respectfully calls to the attention of the Court the words of Judge Learned Hand, in a related context, in United States v. Falcone, 109 F. 2d 579, 581 (2d Cir. 1940):

The distinction [between engaging in a lawful activity the fruits of which others will use unlawfully and promoting the unlawful venture oneself] is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided.

Appellant respectfully requests that the Court re-examine the implication of expanding conspiracy doctrine before making a qualitative extension to the facts of this case.

II

THE MOTION FOR A SEVERANCE SHOULD HAVE BEEN GRANTED

Joinder of the defendants here required the conspiracy charge. Without it, there would have to have been separate trials. Rule 8 Fed. R. Cr. P. Nevertheless, despite these rules, there is no remedy for misjoinder unless it was done in bad faith. Schaffer v. United States, 362 U.S. 511 (1960), Stern v. United States, 409 F. 2d 819, 820 (2d Cir. 1959). United States v. Aiken, 373 F. 2d 294, 299 (2d Cir. 1957).

If appellant's argument above is correct, and the conspiracy charge was improper, appellant will nevertheless have no remedy under these cases. The result of this rule is that the Government is free to define the case initially as it wishes and not suffer the consequence of an overbroad definition that serves its interests. Naturally, this tends to encourage overbroad definitions and the rule has been criticized by Professor Moore. 8 Moore's, Federal Practice §8.06 et seq.

This case presents a twist, however. The prosecutor opened his file prior to the first trial. It indicated his proof and it indicated all the information needed to conclude, based on the cases cited above, that there was no valid conspiracy charge. Still, the motion for a severance was denied. After the first trial ended in a mistrial, the severance motion was renewed on the ground that now everyone knew what the evidence was - it had all been played out in Court - and it was apparent that the conspiracy charge lacked substance. But the Court refused to conclude that the evidence at the second trial would be the same as the evidence at the first, and, in any event, it ruled that the evidence was sufficient to support a charge of conspiracy beyond a reasonable doubt. Appellant has argued above that this ruling was incorrect.

Bad faith is singularly hard to prove. In fact, in an area as wide-open as conspiracy, it is possible with intellectual honesty to attach a conspiracy charge to almost any combination of acts involving the same people. Bad faith should not be the only basis for severance when conspiracy is charged. Where, as here, the facts on file and at the prior trial indicate no conspiracy can be proved beyond a reasonable doubt, a severance should also be granted.

CONCLUSION

The conviction should be reversed and the case remanded on the ground that a conspiracy was not proved and the severance should have been granted.

DATED: New York, New York
November 25, 1974

Respectfully submitted,

STEPHEN GILLERS
Attorney for David Flores

HCB, JR:mj

Bachia. Also recovered in plain view was 4,000 dosage units of L.S.D. packaged in the same fashion as the 10,000 which were in Bachia's possession when he was arrested.

Co-defendant Joseph Wenzler was subsequently arrested and a large amount of marihuana, some cocaine, and some purple haze L.S.D. tablets were recovered.

POINT

The Actions of All Defendants
Constituted One Single Conspiracy
to Distribute Dangerous Drugs in
the New York City Area.

It is the Government's position that the following schematic portrays the core groups as well as roles of co-conspirators in this conspiracy.

Goldstein

|
Supplier

Bachia -- Godinsky

Roommates

Lung
Wenzler

Flores
Vavarigos

Brando
Milley

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DAVID FLORES,

Defendant-Appellant.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
)
) ss.:
COUNTY OF NEW YORK)

ANN M. GERLOCK, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 418 East 81 Street, New York, New York 10028.

On the 25th day of November, 1974, deponent served the within Brief for Defendant-Appellant David Flores upon

Laurence Jacobson, Esq.
Attorney for Defendant Dean Vavarigos
401 Broadway
New York, N. Y. 10013

Irving Cohen, Esq.
Attorney for Defendant Marvin
Goldstein
299 Broadway
New York, N. Y. 10007

Sidney Meyers, Esq.
Attorney for Defendant Joseph
Wenzler
51 Chambers Street
New York, N. Y. 10007.

attorneys for the defendants in this action, at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid

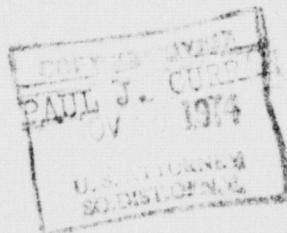
properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ann M. Gerlock
ANN M. GERLOCK

Sworn to before me this
25th day of November, 1974.

STEPHEN GILLERS
Notary Public, State of New York
No. 31-4507113
Qualified in New York County
Commission Expires March 30, 1974

l. g. dill



Copy Received
Henry Hartman
Doll, Jr. & Hartman
David Ross Shirley
November 25, 1974